No. 15038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee, in Bankruptcy of Estate of S. A. WILLEN COMPANY, a corporation, bankrupt,

Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGELES,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

PAGE

PAGE

STATUTES

TEXTBOOKS

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APPELLEE'S BRIEF.

STATEMENT OF JURISDICTION.

1. The District Court's jurisdiction was properly invoked under Section 67c, Title 11, U. S. C. A.

2. Jurisdiction of this court is believed to exist under Section 47 of Title 11, U. S. C. A.

STATEMENT OF THE CASE.

The following implementation and correction of the statement of the case set forth in appellant's opening brief is deemed necessary:[1]

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[1]Although not pertinent to the present appeal, it should nevertheless be noted that the statement on page 3 of appellant's brief that the sum of $15,991.68 is the amount secured by the chattel mortgage is not accurate. The actual amount due is the stated sum together with interest and attorneys' fees.

1. The amount of the loan was paid by appellee to S. A. Willen Co. on February 20, 1953, and not on February 24, 1953. [Finding VI, R. p. 27.]

2. Interest on the promissory note was adjusted through escrow to February 20, 1953. [Ex. 2.]

3. The District Court in its memorandum opinion accepted the Referee's finding that the money was paid on February 20, 1953. The District Court in its memorandum opinion further found that the delivery of the chattel mortgage to the Bank on February 4, 1953, was conditional in that the money was not to be turned over and the transaction completed until February 20, 1953. [R. pp. 39-40.]

4. The District Court in its memorandum opinion found that on February 4, 1953, the mortgage was accepted conditionally by appellee. [R. p. 39.]

SUMMARY OF THE ARGUMENT.

A chattel mortgage is not a grant, nor is it a transfer. A chattel mortgage is a contract and therefore it can be delivered conditionally to the mortgagee to take effect upon performance of the specified conditions. Section 1056 of the California Civil Code, which states that a grant cannot be delivered to the grantee conditionally and that if such delivery is made it will be deemed absolute, is not applicable to chattel mortgages. The chattel mortgage was legally delivered on February 20, 1953, and since it was recorded on that same day there was no delay whatever in recordation.

Whether the escrow was valid as an escrow is immaterial and the District Court properly concluded that it was not necessary to decide that question. The validity of the escrow would only be of consequence if there could not be a conditional delivery to the mortgagee. If there can be a conditional delivery to the mortgagee then it makes no difference whether the conditional delivery is made directly to the mortgagee or through an escrow.

Assuming, as contended for by appellant, that a chattel mortgage is a grant, nevertheless, there must be an acceptance thereof by the grantee. Acceptance is a question of intent and acceptance can be either absolute or conditional. The facts in the case indicate that appellee Bank did not intend to accept the security of the chattel mortgage until the close of escrow. Its acceptance on February 4, 1953, was therefore a conditional acceptance.

Even if Section 1056 of the California Civil Code was applicable and the delivery was deemed absolute on February 4, 1953, and even if acceptance was not conditional on that date, nevertheless, the mortgage would not be an effective mortgage capable of creating a lien until February 20, 1953, for until that time there was no obligation in existence for which the mortgage could be security. There cannot be a mortgage unless and until there is a debt or obligation which can be secured thereby. The obligation came into existence on February 20, 1953, and recordation of the mortgage prior to that time would have been ineffectual and would not have created a lien

in favor of the Bank until February 20, 1953, when the obligation arose.

The Referee's finding that the money was paid by appellee Bank to S. A. Willen Co. on February 20, 1953, is supported by substantial evidence. However, it is immaterial whether the money was actually paid by the Bank to the borrower on February 20, 1953 or February 24, 1953. Regardless of the date of its recordation, a mortgage does not become a lien and an effective mortgage until the obligation for which it is security comes into being.

In any event, assuming that there was an actual delay of 16 days in recording the Chattel Mortgage, such a delay, under the circumstances of our case, would not be so unreasonable as to render the chattel mortgage invalid. A Notice of Intended Mortgage was recorded immediately so that no secret lien was involved. Furthermore, recordation of a mortgage prior to the time that the loan was to be made would not have created a lien and therefore would have been a premature act.

I.

The Effective Delivery Date of the Chattel Mortgage Was on February 20, 1953, at the Close of the Escrow. Delivery on February 4, 1953, Was a Conditional Delivery Only.

There was no delay whatever in recording the chattel mortgage in question. The mortgage was recorded on February 20, 1953, the same day the mortgage became effective and the same day delivery of the mortgage was completed. That the mortgage was delivered on February 20, 1953, was admitted by counsel for appellant on several different occasions. [R. pp. 58, 60.]

From a legal standpoint delivery to the mortgagee was not complete until the mortgage was delivered out of the Bank's escrow department. (*Citizens National Trust and Savings Bank v. Gardner,* 161 F. 2d 530 (C. C. A. 9, 1947).) The *Citizens Bank* case, decided only recently in this very Circuit Court, is squarely in point, holding that a chattel mortgage is deemed delivered as of the close of "escrow." That case is factually identical with the case at bar. In both instances a chattel mortgage was given to secure a loan and in both instances the chattel mortgage was deposited in escrow at the lending bank.

The Referee, in his memorandum opinion, in effect admitted that the *Citizens Bank* case is factually in point, but went on to state that the question of the applicability of Section 1056 of the California Civil Code was not raised in the *Citizens Bank* case. We do not know whether the point that the escrow was opened at the lending bank

was raised in the *Citizens Bank* case in the sense that it was urged as a basis for decision.[2] However, regardless of whether the point was actually urged by the parties, the court was certainly cognizant of it. It was recited in the decision on at least three separate occasions and the court, therefore, was fully aware that the lending bank, through its escrow department, was also the escrow holder. In deciding the case the court said:

> "The evidence, which was presented by a written stipulation, discloses that the bankrupts executed the mortgage on May 4 and deposited it in appellant's escrow department on that date. When the escrow was closed on May 19, the escrow department delivered the mortgage to appellant as mortgagee, and appellant then had the mortgage recorded five days later on May 24.
>
> * * * * * * * *
>
> "*Williams v. Belling, supra,* is authority for the proposition that any presumption that an instrument was executed *and delivered* on the date it bears may be overcome by a contrary showing (76 Cal. App. at page 615, 245 P. 455). We think it clear that until the mortgage was delivered to appellant on May 19, at the close of the escrow, it was not an effective mortgage capable of recordation." (161 F. 2d at 533.)

The case at bar is an *a fortiori* case. In our case, unlike the *Citizens Bank* case, a notice of intended mortgage was recorded and furthermore the time intervening between delivery to the escrow department and recordation of the mortgage was 16 days instead of 20 days.

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[2]It should be noted that appellant trustee in our case was the attorney for the trustee in the *Citizens Bank* case.

Although the *Citizens Bank* case is determinative of the question presented on this appeal, nevertheless, if the matter were to be examined as a new question the result would still be the same on several separate and distinct grounds, which will be hereinafter discussed under this Point I as well as Points II, III and IV.

A. A Chattel Mortgage Is Not a Grant. A Chattel Mortgage Is a Contract and a Contract May Be Delivered Conditionally to the Other Contracting Party to Take Effect Upon Performance of the Condition.

Except for Point IV of appellant's brief, the basis of appellant's argument, as was the entire basis of the Referee's decision, is the applicability of Section 1056 of the California Civil Code to the chattel mortgage in question. Points I, II and III of appellant's brief, in essence, present the following argument: There can be no conditional delivery of a chattel mortgage to the mortgagee. If the escrow holder is not a third person the escrow is invalid and consequently the result is a conditional delivery to the mortgagee. Under Section 1056 of the Civil Code the delivery therefore became an absolute delivery when originally made and consequently the time elapsing between the time of delivery and recordation of the mortgage was 16 days, which period constitutes an unreasonable delay in recordation.

Since appellant's argument rests upon the major premise that there can be no conditional delivery of a mortgage to the mortgagee, appellant's entire argument must necessarily fall upon a showing that the major premise is false. That this premise is false can be demonstrated clearly from the authorities which follow.

Section 1056 of the California Civil Code, which is but a codification of the common law rule in regard to conditional delivery of grants, does not apply to chattel mortgages. This section provides as follows:

> "A grant canot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

As was stated in *Adler v. Sargent,* 109 Cal. 42, 49, 41 Pac. 799 (1895), a mortgage is not a grant. A mortgage does not fall within the definition of a grant in California Civil Code, Section 1053, which states:

> "A transfer in writing is called a grant, or conveyance, or bill of sale. The term 'grant,' in this and the next two articles, includes all these instruments, unless it is specially applied to real property."

Section 1039 of the Civil Code defines transfer as follows:

> "Transfer is an act of the parties, or of the law, *by which the title to property is conveyed* from one living person to another." (Emphasis added.)

It is well settled in California that a mortgage does not transfer title but merely gives a lien on the property as security for a debt. A lien is simply a charge on the property—a thing in action. (*Teater v. Good Hope Development Corp.,* 14 Cal. 2d 196, 93 P. 2d 112 (1939); *McMillan v. Richards,* 9 Cal. 365, 411 (decided in 1858 prior to the adoption of the Codes); *Johnson v. Razy,* 181 Cal. 342, 344, 184 Pac. 657 (1919); *Priddel v. Shankie,* 69 Cal. App. 2d 319, 328, 159 P. 2d 438 (1945).) That a mortgage is not a grant is further indicated by

Section 2952 of the Civil Code which provides, in part, as follows:

> "Mortgages and deeds of trust of real property may be acknowledged or proved, certified and recorded, *in like manner and with like effect, as grants thereof.* . . ." (Emphasis added.)

A mortgage is a contract. (*Lederer v. Muir,* 79 Cal. App. 2d 478, 180 P. 2d 758 (1947).) A mortgage is defined in Section 2920 of the Civil Code as "a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." In their note to this section (2 Civ. Code Ann. (1872) 270-271), the following comment as to the purpose of the section is made by the Code Commissioners:

> "At common law a mortgage was a conveyance of property. . . . The definition of the text is new. It is designed to make a clear distinction between a pledge and a mortgage, and at the same time *to avoid the idea of a mortgage being in any sense a transfer.* 'Hypothecation' is the proper word for this purpose. . . ." (Emphasis added.)

Furthermore, Section 2888 of the Civil Code provides:

> "Notwithstanding an agreement to the contrary, *a lien, or a contract for a lien, transfers no title* to the property subject to the lien." (Emphasis added.)

The rule set forth in Section 1056 of the California Civil Code is not applicable to instruments contractual in nature. Even as to grants the rule has been criticized as arbitrary and without justification. Professor Wigmore states that the rule applies to deeds but that "it has therefore long been well understood, for other writings,

that the finality of the writing as a final act depends upon the circumstances of each case; that it may be left to depend on a third person's assent or upon any other precedent condition; and, in particular, that this is so whether the writing (or escrow) is provisionally handed to the grantee himself or to anyone else." (9 Wigmore, Evidence [3rd ed. 1940], Sec. 2410, p. 30.)

Likewise Restatement of Contracts, Section 241, provides:

> "Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith."

Although there is some early dictum to the contrary, nevertheless, the proposition that there can be a conditional delivery of a contract to the other contracting party is well established and recognized in California in a number of cases.

Spade v. Cossett, 110 Cal. App. 2d 782, 243 P. 2d 799 (1952);

Gleeson v. Dunn, 113 Cal. App. 347, 298 Pac. 119 (1931);

Severance v. Knight-Counihan Co., 29 Cal. 2d 561 177 P. 2d 4 (1947);

Verzan v. McGregor, 23 Cal. 339 (1863).

See dictum *contra* in

California Raisin Growers v. Abbott, 160 Cal. 601, 117 Pac. 767 (1911).

Other California cases have recognized the rule that contractual instruments may be delivered conditionally but found the rule inapplicable to the specific cases involved because the condition was contrary to the written terms of the contract.

Hanrahan-Wilcox Corp. v. Jenison Machinery Co., 23 Cal. App. 2d 642, 73 P. 2d 1241 (1937);

L. B. Williams Organization, Inc. v. Winter, 106 Cal. App. 2d 604, 235 P. 2d 407 (1951).

In *Spade v. Cossett, supra,* defendant signed a written deposit receipt agreement to sell certain property and to pay plaintiff's commission. Defendant handed the writing to plaintiff upon the agreement that plaintiff was not to deliver it to the buyer and that it was to terminate if defendant's husband would not agree to the terms. Defendant's husband did not agree but plaintiff sued for his commission. The court held that the contract between plaintiff and defendant was not binding until the condition upon which delivery was dependent was satisfied, quoting with approval the following language from *Burke v. Dulaney,* 153 U. S. 228, 38 L. Ed. 698 (1894).

> " 'A written contract must be in force as a binding obligation to make it subject to this [parol evidence] rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled.' " (*Spade v. Cossett,* 110 Cal. App. 2d at 784.)

It is significant that all but one of the California cases cited above were decided while Sections 1056 and 1627 of the Civil Code were in effect. Both these sections, it

should be noted, were enacted in 1872 as part of the original codification of California law. Section 1627 of the Civil Code contains the general statement that "The provisions of the chapter on transfers in general, concerning the delivery of grants, absolute and conditional, apply to all written contracts." In spite of this section the California cases, heretofore cited, hold that there can be a conditional delivery of contracts to the other contracting party. The reason must be that Section 1627, which uses rather general language, was not intended to change the then existing law and incorporate the rule of 1056. This would be a natural explanation for otherwise California would be contrary to the overwhelming authority in other jurisdictions. (Among the leading cases in other jurisdictions, see, *Ware v. Allen,* 128 U. S. 590, 32 L. Ed. 563 (1888); and *McClintock v. Ayers,* 36 Wyo. 132, 253 Pac. 658 (1927).)

There is nothing in the case of *Rockefeller v. Smith,* 104 Cal. App. 544, 286 Pac. 487 (1930), relied upon by appellant which is contrary to anything which has been stated hereinabove. Although that case cites a number of Code sections relied upon by appellant, except for one or two Code sections dealing with the general requirement of delivery, none of the Code sections quoted had any bearing on the case. That case merely held that delivery is necessary to make a document operative.

One further point on the question of delivery should be mentioned briefly. Appellant states that there was either an absolute delivery on February 4, 1953, when the escrow was opened or that there was no delivery at all. This argument begs the entire question and completely disregards the third possibility, namely, a conditional

delivery to take full effect in the future upon the performance of a condition. That there can be such a conditional delivery has, we believe, been sufficiently demonstrated.

B. Since There Can Be a Conditional Delivery of a Chattel Mortgage, It Is Immaterial Whether the Escrow Was a Valid Escrow.

In addition to what has been stated in Point I-A above, as is pointed out by a number of the authorities cited by the appellant himself in his opening brief, as well as in his memorandum filed in the District Court, an escrow is but a conditional delivery. (*E.g.,* Cal. Civ. Code, Sec. 1057; 19 Am. Jur. 432; *Lechner v. Halling,* 35 Wash. 2d 903, 216 P. 2d 179, 185 (1950).) The concept of an escrow originated in the law pertaining to deeds and was used as a means of getting around the common law rule set forth in Civil Code Section 1056 that there can be no conditional delivery of a *grant* to the grantee. (18 Cal. Jur. 2d 304.) In fact the California Civil Code section dealing with escrows immediately follows the section which states that there can be no conditional delivery of a grant to the grantee (Cal. Civ. Code, Sec. 1057). Section 1057 of the Civil Code merely states that a grant may be deposited by the grantor with a third person to be delivered by such third person upon the performance of certain conditions and that while in the possession of such third person and subject to the condition it is called an escrow. All Section 1057 states is that a conditional delivery of a grant when it is made to a third person is an escrow. Neither this section, nor the cases stating that there is no escrow unless delivery be to a third person, answer the question as regards delivery to the other party to a transaction. Where a conditional

delivery has been made to the party himself, it may not be an escrow but, nevertheless, it is still a conditional delivery.

Therefore, where the rule of Section 1056 does not apply, it makes no difference how a conditional delivery is handled. In such instance there can be a delivery either to a third person or to the other party to the transaction. That the practice has arisen to use escrows as a convenient method of handling conditional deliveries in situations where an escrow is not legally necessary does not change the rule of law as to when a conditional delivery to the other party may be made. The third party requirement is only significant where it is the only way in which a conditional delivery can be effected. This is borne out by the very authorities cited by appellant for the proposition that the escrow holder must be a stranger to the transaction. For example, on page 8 of appellant's brief, there is a statement from 18 Cal. Jur. 2d 324 to the effect that an escrow holder must be a stranger to the transaction which is the subject matter of the escrow. This statement is, of course, only part of a sentence appearing on page 324. The rest of the sentence goes on to state the reason therefor, namely, ". . . since the ancient rule that delivery of the deed to the grantee as an escrow is to be taken as an absolute delivery is incorporated in the Civil Code." The same is true of appellant's quotation from a section in American Jurisprudence dealing with the general subject matter of who may act as escrow holders. (App. Op. Br. p. 8.) The very next paragraph to that from which the trustee quotes clearly shows the connection between an escrow and a conditional delivery of a grant. The text further goes on to indicate in the very same section that the rule

involving conditional delivery of grants was not applicable to other instruments. (19 Am. Jur. 432.)

The District Court correctly held that it was not necessary in this case to pass upon the question of validity of the escrow. The crucial question is whether there can be a conditional delivery of a chattel mortgage to the mortgagee. Even if we assume that no escrow was created, we still had a conditional delivery, and upon performance of the conditions, an effective mortgage.

II.

The Chattel Mortgage Could Not and Did Not Become an Effective and Binding Chattel Mortgage Until February 20, 1953, for Until That Time There Was No Obligation in Existence for Which the Mortgage Could Be Security.

A. Recordation of the Mortgage Prior to February 20, 1953, Would Have Been Ineffective and Would Not Have Created Any Lien in Favor of the Bank.

If it be assumed, contrary to the authorities cited under Point I above, that a chattel mortgage is a grant and falls within Section 1056 of the Civil Code, the decision of the District Court would still be correct. It is well established that there cannot be a mortgage unless and until there is a debt or obligation which can be secured thereby. (*Coon v. Shry,* 209 Cal. 612, 289 Pac. 815 (1930); *Ahern v. McCarthy,* 107 Cal. 382, 40 Pac. 482 (1895); *Turner v. Gosden,* 121 Cal. App. 20, 8 P. 2d 505 (1932).) Although a document denominated a chattel mortgage was signed and deposited in escrow on February 4, 1953, it is clear from the cases cited that the document did not become in law an effective and operative mortgage until a debt existed.

Recordation of the "chattel mortgage" on February 4, 1953 would have been totally ineffective and no lien would or could have arisen until the debt arose on February 20, 1953 at the close of "escrow." (*Western Loan & Building Co. v. Scheib,* 218 Cal. 386, 23 P. 2d 745 (1933).)

In *Western Loan & Building Co. v. Scheib, supra,* plaintiff agreed to make a loan to defendant upon receipt of a promissory note and mortgage executed by defendant. Defendant executed the instruments and on April 8, 1927 his agent had the mortgage recorded and then delivered the mortgage (but not the note) to plaintiff. Certain mechanics' liens attached on April 13, 1927. Thereafter, on May 27, 1927 the note was delivered to plaintiff. Subsequent to the receipt of the note plaintiff advanced the money. In holding that plaintiff's mortgage was subsequent to the mechanics' liens, the court reasoned as follows:

> "A mortgage is merely security for a debt and if there is no debt there is no mortgage. (17 Cal. Jur. sec. 17, p. 710; sec. 161, p. 873.) Since the debt did not come into existence until May 27, 1927, the mortgage as a lien came into existence at that time." (*Western Loan & Building Co. v. Scheib,* 218 Cal. at 393.)

The court stated that no debt arose until May 27, 1927, because it was not until then, when the note was delivered, that defendant performed all the conditions and plaintiff became obligated to make the loan.

So in the instant case it was not until the close of escrow on the 20th day of February that there was complete performance of all the conditions thereby obli-

gating the Bank to make the loan. Moreover, the debt for which the mortgage became security, namely, the promissory note, was dependent for its efficacy on a condition precedent. The note was delivered in escrow conditionally and it was not to become effective until the Bank loaned the money. The money was not to be loaned and actually was not loaned until February 20, 1953. [Findings IV and VI, R. pp. 26-27.]

Whatever question there may be as to the effectiveness of a conditional delivery with respect to other instruments, there can be no question as to promissory notes. Section 16 of the Uniform Negotiable Instruments Law, adopted in California and set forth in Section 3097 of the Civil Code, expressly provides that "the delivery [of a negotiable instrument] may be shown to have been conditional." The courts in California have ruled accordingly that there can be a conditional delivery of a promissory note, and that until the condition is fulfilled there is no binding obligation. (*Harper v. French,* 29 Cal. App. 2d 214; 84 P. 2d 216 (1938); *Silva v. Gordo,* 65 Cal. App. 486, 224 Pac. 757 (1924).) Section 3097 of the Civil Code did not change the law in this regard. It has always been the rule in California, even prior to the adoption of the Uniform Negotiable Instruments Law, that a promissory note could be delivered conditionally to the payee. (*Billings v. Everett,* 52 Cal. 661; *Jefferson v. Hewitt,* 103 Cal. 624, 37 Pac. 638 (1894).) This, of course, is but an application of the general rule that contractual instruments can be delivered conditionally to the other contracting party. (See cases cited under Point I-A. See, also, *Burke v. Dulaney,* 153 U. S. 228, 38 L. Ed. 698 (1894).)

Authorities in other jurisdictions are in accord with the California cases regarding conditional delivery of promissory notes.

Ware v. Allen, 128 U. S. 590, 595, 32 L. Ed. 563 (1888);

Hogue v. McClain County Natl. Bank, 173 Okla. 122, 47 P. 2d 575, 578 (1935);

Gamble v. Riley, 39 Okla. 363, 135 Pac. 390, 392 (1913);

Alexander v. Kerhulas, 151 S. C. 354, 149 S. E. 12, 13 (1929) (concurring opinion);

Interstate Electric Co. v. Russell, 242 Ala. 233, 5 So. 2d 484 (1942).

Upon the compelling authority of the foregoing cases, it seems clear that there was no debt and no valid promissory note in the instant case until the end of "escrow," at which time the conditions upon which delivery was made to depend were fulfilled and at which time the Bank became obligated to make the loan. This being so, it would seem that only then did the chattel mortgage become effective as a mortgage. It is, therefore, reasonable to conclude that the requirement of recordation of California Civil Code Section 2957 became applicable only on February 20th.

B. Whether the Money Was Actually Paid on February 20, 1953, or on February 24, 1953, Is Immaterial Insofar as the Validity and Effectiveness of the Lien of the Chattel Mortgage Is Concerned.

The Referee found that the proceeds of the loan were paid by appellee Bank to S. A. Willen Co. on February 20, 1953. [Finding VI, R. p. 27.] This finding, as will hereinafter be shown, is supported by substantial evi-

dence. However, appellant challenges this finding and does so for the first time in his opening brief before this Court. It is perhaps significant that appellant trustee had heretofore not questioned the aforesaid finding made by the Referee. Although appellee Bank devoted a substantial portion of its brief before the District Court to the proposition discussed hereinabove under Point II-A, and on several occasions, both in its statement of the facts and in its argument, referred to the fact that the loan was made on February 20, 1953, appellant trustee made no reply thereto nor did he take any issue with the statements of fact contained therein. The record before the District Court is the identical record which is now before this Court, except, of course, for the District Court's memorandum opinion and the notice of appeal. [R. pp. 37, 71-73.]

First: The finding as to when the money was paid is supported by substantial evidence in the record and appellant's statement that the record shows that the money was paid to S. A. Willen Co. on February 24, 1953 rather than February 20, 1953 completely disregards evidence in the record to the contrary.

It is well-established law that evidence of an intent or design to do an act is in and of itself substantial proof that the act was done.

Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. Ed. 706 (1892);

People v. Alcalde, 24 Cal. 2d 177, 148 P. 2d 627 (1944);

Estate of McNamara, 181 Cal. 82, 183 Pac. 552 (1919);

Union Oil Co. v. Stewart, 158 Cal. 149, 110 Pac. 313 (1910);

Benjamin v. District Grand Lodge, 171 Cal. 260, 152 Pac. 731 (1915);

People v. Tugwell, 28 Cal. App. 348, 152 Pac. 740 (1915);

1 Wigmore on Evidence, Sec. 102, p. 534, and Sec. 104.

The notice of intended mortgage [Appellee's Ex. 4] clearly indicates an intent that the consideration be paid on February 20, 1953.

Aside from the notice of intention there is yet another significant item of evidence which supports the Referee's finding. The original promissory note [Appellee's Ex. 2] contains a statement on the reverse side thereof, "Interest adjusted through Escrow No. 24099-2C to 2-20-53" and this statement is signed "Union Bank & Trust Co. of Los Angeles, by John E. Cathey." The clear implication from this statement is that an adjustment in interest was made so that interest ran only from the date that the loan was actually made. Even if another inference from the quoted statement may reasonably be drawn, neverthelesss, where more than one inference may be drawn from the evidence, the conclusion reached by the trier of fact may not be disturbed on appeal. Appellee is entitled to have the evidence construed most favorably to it and is entitled to the full effect of every legitimate inference therefrom.

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 35, 88 L. Ed. 520, 525 (1943);

United States v. Ingalls, 114 F. 2d 839, 842, (App. D. C., 1940);

Helvering v. Johnson, 104 F. 2d 140, 144 (8th Cir., 1939);

Dowell, Inc. v. Jowers, 182 F. 2d 576, 579 (5th Cir., 1950).

Appellant seizes upon one bit of evidence, the statement on the ledger sheet [Appellee's Ex. 5] reading "Date Advanced 2/24/53," which statement unfortunately was never explained through testimony, and relies upon this unexplained statement for the proposition that the money was paid on February 24th, completely disregarding other evidence which supports the finding.

Second: Assuming, however, that the money was paid not on February 20th as found by the Referee, but on February 24th as contended by the appellant, this would have no bearing upon the case and the result would still be the same. As was pointed out in *Western Loan & Building Co. v. Scheib,* 218 Cal. 386, 23 P. 2d 745 (Point II-A above), a mortgage which is recorded prior to the obligation coming into existence becomes effective as a mortgage and a lien on the date the obligation for which it is security comes into being. Although a mortgage recorded prior to the obligation coming into being does not create a lien, nevertheless, it need not be re-recorded when the obligation does come into being and the mortgage takes effect as of the date of the obligation. Furthermore, as is indicated in the cited case, the mortgage becomes effective upon the date the lender is obligated to pay the money. The Bank was not obligated to make the loan until February 20, 1953.

Third: Aside from anything else which has been stated heretofore, the discrepancy between the date of payment and the date of recording is not as great as it might at first blush appear. Assuming the money was paid on February 24th, this was only the next business day following the date upon which the mortgage was recorded. An examination of the mortgage and the

recording data contained thereon [Appellee's Ex. 1] further indicates that the time differential may be only a few minutes. The mortgage was recorded at the County Recorder's office on February 20, 1953 at 2:46 P.M., only 14 minutes before the close of the banking business day. This court can take judicial notice of the fact that February 20, 1953 was a Friday and that the next ensuing banking business day was February 24, 1953. February 22, 1953, Washington's birthday, having fallen on a Sunday, Monday, February 23rd, was a legal holiday. (*Delaware L. & W. R. Co. v. Koske,* 279 U. S. 7, 12, 73 L. Ed. 578, 582 (1929); *Shannon v. United States,* 206 F. 2d 479, 481 (1953); *Shade v. Shade,* 252 Ala. 134, 39 So. 2d 785 (1949); *People v. Cunningham,* 99 Cal. App. 2d 296, 300, 221 P. 2d 283, 286 (1950).)

III.

The Chattel Mortgage Did Not Become an Effective Chattel Mortgage Until It Was Accepted by the Bank.

Aside from what has been said hereinabove concerning a mortgage not becoming effective until there is a debt to secure, there is yet another reason why the chattel mortgage in question did not become effective as such until February 20, 1953. Assuming, as contended by appellant, that a chattel mortgage is a grant, nevertheless, such grant must be accepted by the grantee before it becomes effective. That acceptance is frequently presumed does not derogate from the requirement that there be an acceptance.

Reina v. Erassarret, 90 Cal. App. 2d 418, 203 P. 2d 72 (1949);

Kelly v. Bank of America, 112 Cal. App. 2d 388, 246 P. 2d 92 (1952).

In *Kelly v. Bank of America, supra,* the court stated that we must consider not only the grantor's intent but also whether the deed was delivered to and accepted by the grantee as an unequivocal transfer of title to him. The court went on to quote with approval the following language from *Reina v. Erassarret, supra:*

> "'"Delivery" is a word of well-defined meaning in law. The elements are that the writing must be meant by the maker to take immedaite effect and be presumably or in fact, accepted by the other party. The delivery and acceptance are of necessity simultaneous and correlative acts. The law does not force a man to take title to real property against his will. (*Hibberd v. Smith,* 67 Cal. 547 [4 P. 473, 8 P. 46, 56 Am. St. Rep. 726].) Hence, the assent of the grantee is necessary in order to make a delivery effective and the deed operative as such.'" (112 Cal. App. 2d at 398.)

Acceptance by its very nature is a question of intent. The facts in the instant case indicate that the Bank did not intend to accept the security of the chattel mortgage until the close of escrow. A "Notice of Intended Mortgage" was required and the notice recited that the mortgage would be delivered and the consideration therefor paid on February 20, 1953. The Bank imposed certain conditions and certainly the Bank would not have wanted to accept the security until the conditions had been fulfilled.

In *Imes v. MacDonald,* 113 Cal. App. 427, 298 Pac. 173 (1931), it was held that when plaintiff received the deed from the escrow before the escrow holder obtained a certificate of title, plaintiff's receipt of the deed was a mere "conditional acceptance," which was defined as "where the purchaser at the time of the execution and

delivery of the contract receives a deed not with the intention of having title vest at that time, but with the intention of retaining the deed and having title vest if the abstract of title shows a merchantable title." (113 Cal. App. at p. 433.)

Therefore, whether the mortgagee Bank did not accept until the end of escrow, or accepted at the beginning, but conditionally, it may be argued persuasively that the mortgage lacked legal efficacy until the end of escrow.

IV.

Even if the Chattel Mortgage Had Been Legally Delivered and Accepted on February 4, 1953, Nevertheless, There Was No Unreasonable Delay Under the Circumstances of This Case.

Assuming effective delivery took place on opening of escrow, recordation at close of escrow did not constitute an unreasonable delay. Section 2957 of the California Civil Code, as construed in the early case of *Ruggles v. Cannedy,* 127 Cal. 290, 53 Pac. 911 (1899), requires that a chattel mortgage be recorded promptly. However, whether in a particular instance a chattel mortgage has or has not been recorded promptly depends upon the circumstances of the particular case. (*In re Henningsen* (D. C., N. Y.), 291 Fed. 684, aff'd in 297 Fed. 821; *In re Mercury Engineering, Inc.,* 68 Fed. Supp. 376 (D. C. Cal., 1946); *Citizens National Trust and Savings Bank v. Gardner,* 161 F. 2d 530 (C. C. A. 9).) The fact that in *Williams v. Belling,* 76 Cal. App. 610, 245 Pac. 455, a 14-day delay was deemed to be unreasonable does not mean that a delay of 16 days in the instant case is unreasonable. In the case of *In re Mercury Engi-*

neeging, Inc., 68 Fed. Supp. 376 (D. C. Cal., 1946), the court said, in reference to Civil Code Section 2957:

> "Because the requirement as to recording takes the place of immediate delivery and change of possession required in other cases (Cal. Civ. Code Sec. 3440) the courts have held that this requirement is satisfied only if the recording is done promptly, *unless such recording is impractical or the circumstances of the case warrant delay.*" (Emphasis added.)

In the *Mercury Engineering* case, the requirement of Section 2957 was satisfied by a recordation which took place 26 days after execution. The mortgage was apparently executed on June 30, 1943, by a trustee for a corporation which was then in the process of formation. The company was formed on July 6th and thereafter the trustee transferred the property described in the mortgage to the new corporation. The corporation completed its organization and began business on the week ending July 24th. (The opinion, apparently in error, recites Saturday, July 4th, which was not a Saturday.) The mortgage was recorded on July 26th. The court stated, at page 380:

> "Of course, it could have been recorded before the corporation was organized. But I doubt if any lawyer of experience, especially one experienced in corporate organization, would have advised Mr. Barili to do this. . . .
>
> "We need not discuss the potential liability or claims of liability which such a situation might have engendered. Suffice it to say that the organization of a corporation being a condition precedent to the effectiveness of the chattel mortgage, good business sense and sound legal principles called for delay until organization was achieved."

Appellant seeks to distinguish the *Mercury Engineering* and the *Citizens National Bank* cases on the ground that they involved purchase money mortgages and seeks to convey the impression that Section 2957 of the California Civil Code has no application to purchase money chattel mortgages. The distinction which appellant seeks to make of these cases is non-existent and the language quoted from the two cases on pages 23 and 24 of appellant's brief is highly misleading as quoted.

That appellant's purported distinction is without foundation is apparent from a most cursory reading of those cases. In the *Mercury Engineering* case the validity of the chattel mortgage was challenged on two separate grounds; first, that there had been no compliance with Section 3440 of the California Civil Code in that no notice of intention to mortgage was published and recorded, and second, that there was no compliance with Section 2957 of the California Civil Code in that the chattel mortgage had not been recorded promptly. The court first held in that case that no notice of intention to mortgage was necessary in that Section 3440 did not apply to purchase money mortgages. The court then went on to decide the second issue in the case and held that under the circumstances of that case the delay in recordation of 26 days was not unreasonable and did not render the chattel mortgage void under Section 2957 of the California Civil Code.

Appellant's quote from the *Mercury Engineering* case, appearing on page 23 of his brief, is particularly misleading. Appellant purports to supply a Code section which is not expressly mentioned in the quoted language. In doing so, appellant supplies Section 2957 of the California Civil Code, whereas the provision referred to in

the quoted language was Section 3440 of the Civil Code. Not only is this eminently clear from a reading of the previous paragraph to that quoted, but a footnote in the opinion to the very language quoted by appellant places that question beyond any shadow of doubt. The footnote cites the Second Circuit case referred to in the language quoted in the brief and an examination of that case reveals that it dealt solely with the New York counterpart of Section 3440 of the Civil Code of California.

What has been said in regard to the *Mercury Engineering* case is equally applicable to the *Citizens Bank* case. In that case, as in the *Mercury Engineering* case, the court expressly stated that the trustee was seeking to declare the chattel mortgage void as against him "on the grounds [1] that the notice of intention to chattel mortgage the property, required by §3440 California Civil Code, was never published; [2] that appellant had failed to record a copy of the mortgage within a reasonable time after its execution, as required by §2957 California Civil Code; and [3] that a certified copy of the mortgage was not promptly deposited with the Department of Motor Vehicles, in compliance with §195 of the California Vehicle Code." (161 F. 2d at 532.) The court, in the *Citizens Bank* case, first decided that Section 3440 did not apply and then went on to decide as discussed under Point I hereinabove that the mortgage was delivered as of the close of escrow and that since the mortgage was delivered within five days thereafter there was no unreasonable delay in recordation.

Appellant's further statement that because the *Mercury Engineering* and *Citizens Bank* cases involved a purchase money mortgage intervening creditors' rights were not

affected is not only irrelevant but fallacious as well. It is irrelevant because, as appellant himself points out on page 22 of his brief, a chattel mortgage which has not been properly recorded is invalid as to antecedent or existing creditors as well as intervening creditors. (*Noyes v. Bank of Italy,* 206 Cal. 266, 272, 274 Pac. 68, 71 (1929).)[3] It is fallacious in that there can be intervening creditors in a purchase money mortgage as well as in any other mortgage. If recording is delayed, creditors can come into existence during the period between execution and delivery of the purchase money mortgage and its recordation. The *Mercury Engineering* and *Citizens Bank* decisions do not state whether intervening creditors, antecedent creditors, or both, were involved. Certainly there must have been some creditors, otherwise there would be no basis for the contention by the trustee in bankruptcy in each of the cases as to invalidity of the mortgages under Section 2957 of the California Civil Code.

In the case of *In re Henningsen,* 291 Fed. 684, aff'd in 297 Fed. 821, the court held that a delay of 50 days (May 24th to July 13th) was justified and reasonable where the delay was due to a search which was made to determine whether there were any additional liens on the mortgaged property.

With respect to the instant case, it has been shown hereinabove (Point II) that the chattel mortgage was ineffective until February 20th, for until that time there

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[3]Since an improperly recorded mortgage is equally invalid as to existing creditors, appellant's attempted distinction of *Summerville v. Kelliher,* 144 Cal. 155, 77 Pac. 889 (1904), in which a 15-day delay was held not to invalidate a mortgage, is not sound.

existed no debt which it could secure. Therefore, as in the *Mercury Engineering* case, an experienced lawyer, pursuant to "good business sense and sound legal principles," could reasonably have advised a delay in recordation until February 20th. A sooner recordation would not have established the priority of the mortgage until February 20th. (*Western Loan & Building Co. v. Schieb,* 218 Cal. 386, 23 P. 2d 745 (1933).) Therefore, the reason for prompt recordation set forth in *Williams v. Belling,* 76 Cal. App. 610, 245 Pac. 455 (1926), namely, "in order to give notice to and bind third parties," does not exist in the instant case. Furthermore, the "manifest policy" of Section 2957 and similar sections enunciated in *Ruggles v. Cannedy,* 127 Cal. 290, 53 Pac. 911 (1899), is inapplicable to the facts of the present case. That court stated: "The very object of them all, the reason for their being, is to prevent secret liens upon and interests in personal property." There was no lien in the instant case until February 20th, and the recorded and published notice of intended mortgage eliminated any element of secrecy.

Assuming again, for the sake of discussion, that the chattel mortgage was legally delivered and became effective on February 4th, there is still another factor in this case which would render a delay in recordation of 16 days reasonable.

As part of the loan transaction, the mortgagor executed a "Notice of Intended Mortgage," which the Bank recorded the next day, February 5, 1953. The Referee in his memorandum states that "The nature of the bankrupt's business did not require compliance with section 3440.1 [Cal. Civ. Code]." Yet the Referee found that

the mortgagor was not only a manufacturer but also a jobber of cotton products. Section 3440.1 of the California Civil Code is applicable to a "mortgage of the fixtures or store equipment of a . . . retail or wholesale merchant."

A jobber is a wholesale merchant, a particular type of wholesale merchant. The test of a wholesaler generally is whether he sells to those who sell again.

Zehring v. Brown Materials, 48 Fed. Supp. 740 (D. C., Cal. 1943);

Harris v. Hammond, 51 Fed. Supp. 91 (D. C., Ga. 1943);

Haynie v. Hogue Lumber & Supply Co., 96 Fed. Supp. 214, 216 (D. C., Miss. 1951);

Guess v. Montaque, 51 Fed. Supp. 61 (D. C., S. C. 1942).

A jobber falls squarely within the test for a wholesaler. Both are middlemen. Webster's New International Dictionary, 2nd ed., defines a jobber as "one who buys goods from importers or producers and sells to other dealers; a middleman." Furthermore, it is arguable that "retailer" and "wholesaler," which are often defined by distinguishing one from the other, were intended in Section 3440.1 to be collectively exhaustive and cover the whole field of distribution of goods. This is borne out by the purpose of this section, which applies equally to a jobber as to any other merchant. In the *Mercury Engineering* case, *supra,* the court stated that the object of the statute "is to protect the creditors against a surreptitious sale or incumbrance of the chief assets or equipment of a trader." (68 Fed. Supp. at 379.)

However, whether the chattel mortgage in question does or does not fall within Section 3440.1 is not important in this case. What is important is that a lender who insists on security should not be forced to make a binding and conclusive determination whether any of the items in the mortgage are the fixtures or equipment of a wholesale merchant so as to make Section 3440.1 applicable. In the instant case there was no delay beyond the time necessary to make the notice of intended mortgage effective. The Bank acted in good faith. [R. p. 64.] Certainly a bank loaning money should be able to protect itself against a possible later contention that the mortgage was void for failure to first record a notice. Proof that such later contentions have been made is found in the many cases which deal with the applicability of Section 3440.1. We need only look at the *Mercury Engineering* and *Citizens Bank* cases, where the trustee in bankruptcy claimed that a chattel mortgage fell within Section 3440 [now 3440.1] and therefore was invalid because no notice of intended mortgage had been recorded.

If a delay long enough only to record a notice and wait the requisite 10 days thereafter constitutes an unreasonable delay where it is subsequently determined that the notice was unnecessary, it would mean that even the most careful and prudent lender would never know whether he actually received the security for which he bargained. If the lender does not record a notice of intended mortgage and it is later determined that he should have done so, his mortgage is invalid. On the other hand if he plays safe and files a notice of intended mortgage and it is subsequently claimed and determined that such notice was not necessary in his particular case then, according to the Referee's ruling and appellant's con-

tention, the lender has been guilty of undue delay in spite of the fact that he has recorded a notice of which any creditor making a title search would have knowledge. Such is not and cannot be the law as to what constitutes unreasonable delay in recording a chattel mortgage.

Conclusion.

The parties to the mortgage and loan transaction clearly intended that the mortgage be delivered and that it take effect on February 20, 1953. Unless there is some public policy or rule of law precluding its accomplishment, effect should be given to the intention of the parties. It has been shown in this brief that there is no public policy or rule of law which would prevent giving effect to the intention of the parties. On the contrary we believe the law compels a holding that the chattel mortgage was valid and enforceable against the mortgagee's creditors as well as the trustee in bankruptcy. Since a summary of the argument is contained elsewhere in this brief, it need not be repeated in this concluding paragraph. Suffice it to say that we believe the District Court's decision is in all respects correct and should therefore be affirmed.

Respectfully submitted,

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